88-930

No.

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
October Term 1988

JOSEPH VINCENT CUSUMANO and
BEN SCHMOUTEY,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD R.J. KANE, ESQ.
550 East Charleston Blvd. #B
Las Vegas, Nevada 89104
Telephone: (702) 383-8332

Attorney for Petitioner Cusumano

OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorney for Petitioner Schmoutey

CASILLAS PRESS INC., 1717 K STREET, N.W. WASHINGTON, D.C. 20036

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the indictment against Petitioners, coupled with the trial court's instructions to the jury, violate this Court's holdings in *McNally v. United States*, 483 U.S. _____, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), and *Carpenter v. United States*, 484 U.S. _____, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987)?

2. Did the trial court's sua sponte change in the key conspiracy instruction — after defense counsel had finished their closing arguments but before the Government began its final summation — deny Petitioners a fair trial?

## PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all the parties to the instant Petition.

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IN THE

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OCTOBER TERM, 1988

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JOSEPH VINCENT CUSUMANO and
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UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## THE OPINION BELOW

The Ninth Circuit's opinion below was designated a "Memorandum" not intended for publication under Circuit Rule 36-2. Although not reported, the Memorandum is reproduced in its entirety and attached hereto as Appendix A.

## JURISDICTION OF THIS COURT

The United States Court of Appeals for the Ninth Circuit entered its Memorandum on October 5, 1988. No motion for rehearing was filed. Pursuant to Supreme Court Rule 20.1, this Petition is timely filed. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 30 [effective until August 1, 1988] provided as follows: "At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objectIon. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

## STATEMENT OF THE CASE

Petitioners and 5 other Defendants were indicted for criminal conspiracy and other offenses relating to the selection of a new insurance carrier for the Southern Nevada Culinary Workers and Bartenders Health and Welfare Trust Fund, while Petitioner Schmoutey was serving as its Secretary Treasurer.[1] The gist of the conspiracy, and the evidence adduced at trial, was that Petitioners used their influence to assure (1) the selection of co-defendant National Western Life Insurance Company as the Trust Fund's carrier and (2) the delivery to Petitioner Schmoutey of a share of the agent's commissions

[1]Petitioners' co-defendants below included the selected insurance company itself, two of its officers, and two insurance agents. The only other co-defendant was severed for health reasons early in the proceedings.

for writing the new policies. However, there was no evidence that Petitioner Cusumano ever received a "kickback", and Petitioner Schmoutey was acquitted of failing to report the "kickback" he allegedly received.

After all of the evidence was presented to the jury, the trial court gave counsel for all of the parties copies of the instructions it intended to give, and defense counsel made their closing arguments based upon those instructions. The trial court then materially altered the conspiracy instruction, over Petitioners' objection, before the Government made its final summation. After three days of deliberations, the jury acquitted the insurance defendants of all charges, but convicted both Petitioners of the conspiracy count, as well as the related mail fraud, interstate travel in aid of racketeering, and aiding and abetting counts. Petitioner Schmoutey was also convicted of making a false statement in a document required to be kept by ERISA, but was acquitted of making a false tax return.

In post-trial motions, Petitioners attacked the indictment and instructions pertaining to the mail fraud counts in light of this Court's decision in *United States v. McNally*, 107 S.Ct. 2875 (1987). That challenge was rejected by the trial court, and concurrent sentences of four (4) years on each count imposed on Petitioner Cusumano, and five (5) years on each count on Petitioner Schmoutey. The Ninth Circuit thereafter affirmed the convictions in a Memorandum not for publication.

## REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit did not address the change in jury instructions between the defense and Government summations to the jury, despite the intent of Federal Rule of Criminal Procedure 30 to avoid such prejudicial changes. See, for example: *United States v. Wander*, 601 F.2d 1251, 1263 (3rd Cir.

1979); *United States v. Oliver*, 766 F.2d 252, 254 (6th Cir. 1985); *United States v. Bass*, 425 F.2d 161, 163 (7th Cir. 1970); *Wright v. United States*, 339 F.2d 578, 580 (9th Cir. 1964); *United States v. Smith*, 629 F.2d 650, 653 (10th Cir. 1980). Rather, the Ninth Circuit treated the new instruction as a comment on the evidence. To the extent that this recasting of the issue represents a departure from enforcement of Rule 30, this Court should invoke its supervisory powers and review the issue de novo.

2. Although this Court's decisions in *McNally* and *Carpenter* did not limit the scope of 18 USC 1341 to tangible as distinguished from intangible property rights, those decisions have been interpreted "to exclude from the reach of the mail fraud statute claims which did not involve a direct intention to deprive another of a recognized and traditional property right (tangible or intangible) through the employment of fraud or other artifice and the use of the public mail." *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988).

Most federal appellate courts, however, have continued to review mail fraud convictions in terms of the type of right impacted (tangible versus intangible), rather than focusing on whose money or property was taken (or intended to be taken). As a result, the controlling factors under this Court's decisions have been ignored in favor of seemingly arbitrary classifications of rights as tangible or intangible, with the result dictated accordingly.[2]

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[2]*See for example, United States v. Telink, Inc.*, 681 F.Supp. 1454 (S.D.Cal. 1988) (government's right to expect contracting parties to proceed in good faith held to be a property right); *United States v. Grossman*, 843 F.2d 78 (2nd Cir. 1988) (commercially unexploitable information held to be a property right); *United States v. Runnels*, 842 F.2d 909 (6th Cir. 1988) (benefits growing out of a fiduciary obligation held to be a property right). *Compare: United States v. Gordon*, 836 F.2d 1312 (11th Cir. 1988)

For example, *McNally* involved a scheme by public officials to steer a workmen's compensation policy to a particular insurance agency, in exchange for a share (denominated as "monetary kickbacks") of that agency's commissions. Likewise, the instant prosecution alleged a scheme by a union official (Petitioner Schmoutey) and others to obtain certain insurance policies through a particular agent, in exchange for a share (denominated as "monetary kickbacks") of that agent's commissions. In both cases, the mail fraud counts included an allegation of a scheme to defraud certain persons (citizens of Kentucky in *McNally*; trust beneficiaries in the instant case) of their intangible right to the official's faithful and honest services. But these factual similarities were lost on the trial court and the Ninth Circuit, both of which focused on the deprivation of money (rather than faithful service) as supporting the Petitioners' convictions.

By clever analysis, it is possible to view such schemes as depriving unwitting citizens or trust beneficiaries of their money, even though the only money affected is that of the agent. Yet it is impossible to reconcile *Carpenter* with *McNally* by such analyses, without focusing on whose "property" was the subject of the scheme. In *Carpenter*, the "property" was that of the *Wall Street Journal*, which did not consent to Carpenter's prepublication use of that "property." In *McNally*, as in this case, the money or property was that of the agent, who did consent to its "deprivation." Anyone else's rights

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(mailing of fraudulently marked absentee ballots held to inolve only intangible rights); *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) (state's right to accurate information with respect to its issuance of bingo permits held to be an intangible right); *Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988) (using state bail bond refunds to bribe judge held to impact only the intangible right to honest administration of justice).

impacted by these cases were simply too intangible to support a conviction.[3]

In other words, while *Carpenter* has freed the lower courts from distinguishing between tangible and intangible property rights in mail fraud cases, it has not freed the lower courts from properly identifying whose property is the subject of the scheme or artifice in question. And no instruction on the type of scheme the law prohibits will cure a faulty identification in this regard. Petitioners contend that the decisions of the federal courts in post-*McNally* cases have failed to grasp this important distinction, and thus clarification or harmonization by this Court of the law in this area is necessary.

[3]In *McNally*, this Court reversed both the petitioners' conspiracy convictions as well as their substantive mail fraud convictions. The instant Petitioners contend that the same result should attain in the instant case.

## CONCLUSION

This Honorable Court should grant the instant Petition (1) to ensure proper enforcement by the federal courts of Federal Rule of Criminal Procedure 30, and (2) to clarify the proper application of *McNally* and *Carpenter* in mail fraud cases where the trial court does not require the jury to identify whose money or property was targeted by the scheme.

Respectfully Submitted,

EDWARD R.J. KANE, ESQ.
550 East Charleston Blvd. #B
Las Vegas, Nevada 89104

Attorney for Petitioner CUSUMANO

OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner SCHMOUTEY

# APPENDIX A

FILED OCT 5 1988

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

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|---|---|
| UNITED STATES OF AMERICA, | |
| | Nos. 87-1234, 87-1235 |
| Plaintiff/Appellee, | |
| | D.C. No. 85-206-HDM |
| v. | |
| JOSEPH VINCENT CUSUMANO; BEN SCHMOUTEY, | MEMORANDUM* |
| Defendants-Appellants. | |

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued June 17, 1988
San Francisco, California
Submitted July 7, 1988

FILED: OCT 5 1988

Before: ALARCON, HALL, and KOZINSKI, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellants appeal from their jury trial convictions of numerous offenses arising from a scheme to have a certain insurance company selected as the carrier for an ERISA trust.

Appellants argue that there was a misjoinder and that severance was mandated by Fed. R. Crim. P. 8 and 14.

The propriety of joinder under Fed. R. Crim. P. 8 is a question of law reviewable de novo. *See United States v. Friedman*, 445 F.2d 1076, 1082 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971).

There is no indication that the appellants raised their Rule 8 claim before the district court. Because this argument was not made to the district court, it is waived on appeal. *United States v. Ross*, 464 F.2d 1089. 1978, 1280 (9th Cir. 1972).

Even if appellants had preserved this objection, their claim must fail. We have a policy of broadly construing Rule 8 in favor of initial joinder, *United States v. Ford*, 632 F.2d 1354, 1373 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981), and the mere charging of conspiracy makes joinder proper under Rule 8, see *United States v. Valenzuela*, 596 F.2d 824, 829 (9th Cir.), *cert. denied*, 441 U.S. 965 (1979). In this case, a conspiracy count was brought. Although a conspiracy charge brought in bad faith will not satisfy Rule 8, appellants have neither alleged nor substantiated an allegation of bad faith. See *id.*

Appellants also argue that there was insufficient evidence adduced at trial to support the basis for initial joinder. The failure of the government to produce sufficient evidence to prove the count which made possible the initial joinder is not a ground for severance under Rule 14 unless prejudice is shown. *United States v. Cozzetti*, 441 F.2d 344, 349 (9th Cir. 1971) (if initial joinder is proper, failure of proof of conspiracy count that made joinder possible is not a ground for Rule 14

severance absent prejudice); *United States v. Valenzuela*, 596 F.2d 824, 829 (9th Cir. 1979) (reversal of conspiracy count does not require reversal of joined offenses).

"Appellants carry the difficult burden of demonstrating undue prejudice resulting from a joint trial, and we will reverse the trial court only in those rare instances where the refusal to sever amounts to an abuse of discretion." *United States v. Ford*, 632 F.2d 1354, 1373 (9th Cir. 1980) (quoting *United States v. McDonald*, 576 F.2d 1350, 1356 (9th Cir. 1978)). Even assuming that the evidence at trial was insufficient to connect the appellants with the other defendants, appellants fail to show that the district court abused its discretion by declining to sever under Rule 14.

Appellants complain about the trial judge's comment to the jury that there was insufficient evidence to connect the defendants with certain objects of the conspiracy charged. However, the judge was entitled to comment on the evidence. Moreover, we are not persuaded that appellants were prejudiced by this comment.

Appellants also claim that a jury instruction allowed conviction on an improper basis. They argue that it allowed them to be convicted under 18 U.S.C. Sec. 1341 (mail fraud) for defrauding people of intangible rights to honest services in violation of *McNally v. United States*, 107 S. Ct. 2875 (1987). Whether jury instructions misstate the law is a question of law reviewable de novo. *United States v. Douglass*, 780 F.2d 1472, 1475 (9th Cir. 1986).

In explaining what the statute prohibited, the court only discussed plans to obtain fraudulently money or property. The court made no mention of defrauding someone of intangible rights such as rights to honest trustee services. In fact, on appellants' objection, the court had deleted an instruction that

the plan could be one to defraud trust beneficiaries of loyal service.

Appellants complain that the use of the word "include" allowed the jury to determine that the statute prohibited defrauding people of things other than money or property: namely, intangible rights to honest trustee services. However, instructions cannot be judged in isolation; they must be taken as a whole when considering their propriety. *United States v. Wolters*, 656 F.2d 523, 5256 (9th Cir. 1981). Appellants fail to view the instruction in context. Although the court used the term "include," it instructed the jury only on what the law now prohibits: scheme to defraud of money or property.

We reject as meritless appellants' other arguments.

AFFIRMED.